# Supreme Court of the United States

OCTOBER TERM, 1953

**Docket No.....**

HARVEY STOLLER, d/b/a RICHLAND LAUNDRY AND DRY CLEANERS, and LAUNDRY AND DRY CLEANERS UNION, LOCAL 197, AFFILIATED WITH LAUNDRY WORKERS INTERNATIONAL UNION, A.F.L., *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

## PETITION OF LAUNDRY AND DRY CLEANERS CLEANERS UNION,LOCAL 197, AFFILIATED WITH LAUNDRY WORKERS INTERNATIONAL UNION, A.F.L., FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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# Supreme Court of the United States

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| HARVEY STOLLER, d/b/a RICHLAND LAUNDRY AND DRY CLEANERS, and LAUNDRY AND DRY CLEANERS UNION, LOCAL 197, AFFILIATED WITH LAUNDRY WORKERS INTERNATIONAL UNION, A.F.L., *Petitioners,* vs. NATIONAL LABOR RELATIONS BOARD, *Respondent.* | Docket No..... |

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*To the Honorable Earl Warren, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:*

Come now the INTERNATIONAL LAUNDRY WORKERS UNION, A.F.L., and LAUNDRY AND DRY CLEANERS UNION, LOCAL 197, AFFILIATED WITH THE INTERNATIONAL LAUNDRY WORKERS UNION, A.F.L., and respectfully petition this Court for a Writ of Certiorari to issue, to review a decision of the United States Court of Appeals for the Ninth Circuit, rendered September 23, 1953.

## OPINION

Petition for Rehearing was denied October 21, 1953. The Court's Opinion is reported at 207 F.(2d) 305, and is attached to the companion Petition for Certiorari presented by HARVEY STOLLER d/b/a RICHLAND LAUNDRY AND DRY CLEANERS, as Appendix "A," which by reference thereto we adopt herein.

The Circuit Court affirmed a decision and order of the National Labor Relations Board, hereinafter referred to as "Board," dated March 6, 1951. The decision of the Board, reported in 93 N.L.R.B. 680, is attached as Appendix "B" to the companion petition of HARVEY STOLLER, d/b/a RICHLAND LAUNDRY AND DRY CLEANERS, filed contemporaneously herewith, which by reference thereto we hereby adopt.

## JURISDICTION

The opinion of the United States Court of Appeals, for the Ninth Circuit, was entered and filed September 23, 1953. The petition for rehearing was denied October 21, 1953. The decree enforcing the order of the National Labor Relations Board was entered by the United States Court of Appeals, for the Ninth Circuit, November 9, 1953. Jurisdiction of this Court is invoked under the statutes of the United States, notably 28 U.S.C. 1254 (1) and 29 U.S.C. 160 (f).

## QUESTION PRESENTED

The problem here presented may be compactly stated first by paraphrasing it as submitted to the Circuit Court below, and then by recasting in the form in which we feel it serves to raise a substantial federal question of great concern to both the states and the nation, important enough to warrant and require consideration by this Court. In abbreviated form we posed the problems to the Circuit Court below substantially as follows:

> (1) Does the Commerce Clause of the Federal Constitution authorize the Board under the National Labor Relations Act to exercise jurisdiction over an admittedly local intrastate laundry in and by reason of its location within a defense project?
>
> (2) If the Board asserts jurisdiction over such a business, is it not as a condition prerequisite required officially to publish a promulgation of such policy in accordance with the Administrative Procedure Act before asserting it for the first time and applying it retroactively?
>
> (3) Where such a policy had theretofore been non-existent, may the Board without notice either to the employer or to the Union involved, impose it in such a way as to exact retroactive penalties and sanctions?

In the light of the statutes quoted in Appendix "A," it should have been held, and we urge contrary to the court below, must be held:

> (i) That the operation of the local laundry at Richland, involved in this case, does not involve an *"obstruction * * * to the free flow of commerce"* (29 U.S.C., Sec. 151).

(ii) That operation of this local laundry does not constitute *"commerce"* * * * *"transportation"* * * * *"among the several states"* (29 U.S.C. 152 (6)).

(iii) Nor does the operation of this local community laundry *"affect commerce"* in the sense that it is *"in commerce"* or that it *"burdens commerce"* or that it in any appreciable way *"tends to lead to a labor dispute, burden or affect commerce or the free flow of commerce"* (29 U.S.C. 152 (7)).

(iv) That while the statute affords the Board authority to *"make rules and regulations"* it does not under the guise thereof authorize the Board to reach out and seize a purely local and community business and brand or label it *"commerce,"* nor may the rule-making power be substituted for the Board's enumerated statutory powers merely because a local laundry is located upon a national defense project.

(v) That if, in fact, the community laundry here involved is a local operation, no unfair labor practice *"affecting commerce"* has been committed solely by reason of the existence of the operation upon and within a national defense project (29 U.S.C. 160(a)).

Amplifying these questions without altering their sense or substance thus presented to the Court below, we undertake, for purposes of this petition, to formulate them in order to pin-point the far-reaching importance of the issues involved:

(a) May the Board, of its own motion, without express legislative sanction, extend its jurisdiction so as to include a purely local operation—a community laundry here—without notice or publication thereof, merely by adopting a new criterion

defined as "establishment substantially affecting commerce"?

(b) In any event, may the Board so exercise its power as to penalize an employer and a union *retroactively* under a contract which, when executed, was valid under the state law? Is not such an attempt a violation of the concept of due process?

(c) Must it not, in any event, comply with the Administrative Procedure Act requiring new promulgations of regulations and policy to be published in the Federal Register?

(d) Is a community laundry, admittedly otherwise local and intrastate, converted *ipso facto* into interstate commerce, merely by virtue of its location within a national defense project?

(e) Where the Board rejects a finding that the laundry is engaged in interstate commerce (other than by reason of its location within a national defense project) may the Circuit Court below base its decision upon a finding of its own making, resting jurisdiction solely upon the adventitious and ever-shifting year-to-year circumstance that the local laundry purchased a minimal quantity of soap from without the state? Is it not error for the Circuit Court to make a finding which the Board itself disavows, and to find interstate commerce where the Board itself finds that the local operation is not engaged in "commerce" *qua* "commerce"? Does not the factitious purchase of soap in some given year amount to a consideration falling squarely within the spirit of the rule of *de minimis*? Is not the purchase of soap, one year perhaps *inter*, another year *intra*, too peripatetic a

premise—too ephemeral—upon which to find interstate commerce?[a1]

## STATUTES

The subject matter of the controversy herein involves (1) the Fifth Amendment to the Constitution of the United States, (2) the National Labor Relations Act, notably Sections 151, 152, 156 and 160, (3) the Administrative Procedure Act, 5 U.S.C., Sections 1001 *et seq.*, particularly Sections 1001(c)(f), 1002(a)(b)(c), and 1009(e). Applicable statutes particularly pertinent appear herein as Appendix "A."

## STATEMENT OF MATTER INVOLVED

These petitioners, joining as they do in the companion petition of the employer, Harvey Stoller, filed concurrently herewith, seeing no sufficient reason to warrant repeating here facts so excellently stated in

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[a1] We are conscious of the fact that *certiorari* does not issue merely to review error of law on the part of the court below but the fact that grievous prejudice results to these petitioners and may, unless checked by this court, operate a serious prejudice to many others similarly situated can scarcely be better illustrated than by referring to the recent decision of the Ninth Circuit, that of *N.L.R.B. v. Pappas & Co.* (C.A. 9) 203 F.(2d) 569, decided April 22, 1953. There, the Circuit held that an objection not urged before the Board could not be considered by the court, and it very soundly predicated its holding upon the express language to that effect contained in 29 U.S.C. 160(c). Its deviation from the Board's finding in this case is equally as prejudicial as was the attempt to do so which it condemned in the *Pappas* case, and that prejudice cannot be cured merely because the court's departure in the instant case was of its own motion.

employer's co-petition, both under the topic of "Statement of the Matter Involved" (Pages 3-6, Stoller petition) and under the topic of "Facts" (Pages 6-12, Stoller petition), and in the interest of brevity, hereby adopt the facts stated therein by reference thereto.

These petitioners merely desire, supplementary thereto, to emphasize that the petitioning employer entered into a contract with petitioning union on January 25, 1950, requiring membership in the union as a condition of employment. This contract was executed under and conformable to the laws of the State of Washington.[1] Some months thereafter—precisely as of April 18, 1950—the Board undertook for the first time to assert jurisdiction over the laundry operation and filed charges against the employer and the union by reason of the dismissal of certain employees for failure to continue their membership in the union pursuant to the contract. (We vigorously challenged this summary action before the Circuit Court as violative of the protective sanctions vouchsafed under the Administrative Procedure Act (See *Universal Camera Corp. v. N. L. R. B.*, 340 U.S. 474, 95 L.Ed. 456). We renew the challenge before this Court but do not further notice it herein since it has been so excellently urged and argued in the brief of co-petitioner Stoller (Pages 62-67, Stoller brief), which argument we adopt).

The next fact in the table of events affecting this controversy is that the Board issued in published form for the first time (but not through publication in the

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[1] *Yeager v. International Brotherhood of Teamsters*, 39 Wn.(2d) 807, 239 P.(2d) 318.

Federal Register) its new "standard" "for exercising jurisdiction" *"over establishments substantially affecting national defense"* on October 5, 1950—some eight months after it had unilaterally and *ex parte,* so to speak, asserted jurisdiction over the instant employer by means of the charges filed in the prior month of April.

A fact next in order of importance is the finding by the Board, as a result of the hearing on these charges, both by its intermediate trial examiner and the Board in its decision of March 6, 1951, that its jurisdiction depended not upon the fact that the laundry here in question was, *de ipso,* an operation engaged in commerce under the Act, but rather upon the fact that the location and operation of the laundry, though exclusively within the state of Washington, bore such a "relationship to the national defense effort" as to "warrant full exercise of the Board's power." (R.I., pages 42 to 70; 74 to 87, Appendix "B," Stoller petition).

Another fact which not only places this laundry operation in its proper contextual background but which goes a long way toward illustrating the irreparable prejudice and discrimination which the Board's decision visits upon petitioners is to be found in the evidence, unquestioned and admitted in the record, that petitioning laundry is by no means a monopoly in the Richland area. On the contrary, it is in competition with at least ten other local laundry businesses (R.I. 64 *et seq.*).

## SPECIFICATIONS OF ERROR

1. Board action here exceeds congressional and constitutional grant of jurisdiction.

2. Board order void: failure to comply with Administrative Procedure Act.

3. Board action here is retroactive assertion of new policy imposing penalties and sanctions constituting denial of due process and property rights to these petitioners.

## REASONS FOR GRANTING WRIT

The U. S. Court of Appeals for the Ninth Circuit, in its decision below, decided an important question arising not only under the Fifth and Fourteenth Amendments to the Constitution of the United States and under the Commerce Clause of the Constitution, but likewise, under specific statutes of Congress, enumerating powers of the National Labor Relations Board under the Commerce Clause. By its decision it sustained a new and hitherto unprecedented exercise by the Board of jurisdiction over an intrastate laundry. The intrastate laundry, at the time that the Board undertook to subject it to federal action and control, was operating in traditional conformity with the laws of the State of Washington. The Circuit Court decision, as we conceive it, was thoroughly untenable for the reason that if allowed to stand, its *ratio decidendi* would be so universal and sweeping in scope as to permit, with little or no exception, of the absorption of all purely local and intrastate businesses by federal agencies asserting power and jurisdiction under the

Commerce Clause. The premises upon which the Circuit Court's decision rested a finding of interstate commerce are readily present and discernible in practically all local intrastate operations. The line of distinction between local and interstate, so carefully preserved under our constitutional system, would be wiped out, and citizens of the individual states would, to an incalculable extent, be deprived of cherished constitutional sanctions against federal encroachment. This is, we submit, a real, substantial and by no means a phantom problem. It is one of such far-reaching importance as to be worthy, we earnestly feel, of studied consideration and solution by this Court.[2]

The decision of U. S. Court of Appeals for the Ninth Circuit constituted a marked departure from and a prejudicial erosion of hitherto settled constitutional principles. The decision undertook, to the serious prejudice of these petitioners and ultimately, if allowed to stand, to the prejudice of an infinitely innumerable class of citizens of the various states engaged in local businesses, to vest the Board, as a national agency, with control over a business heretofore admittedly purely intrastate in character. This Court, under similar circumstances, has heretofore seen fit to intervene.[3] In the face of facts

[2] We do not file a separate brief in support of our petition for writ. The matter has been satisfactorily argued in the supporting brief of our co-petitioner, *Stoller d/b/a Richland Laundry and Dry Cleaners*, filed contemporaneously herewith, and we confine ourselves to a statement of the reasons supporting our petition, reserving a brief to be submitted in the event this Court should deem it proper to issue a writ.

[3] Cf. *Meyer v. Bethlehem Corp.*, 303 U.S. 41.

and circumstances presented in the record in the instant case this Court, in a long line of decisions, has decided the controversy in the case entirely contrary to the principle of the decision of the Circuit Court below. Among such decisions are the following:

*Addison v. Holly Hill Fruit Products,* 322 U.S. 607, 88 L.Ed. 1488;

*Iselin v. United States,* 270 U.S. 245, 70 L.Ed. 566;

*Manhattan G. E. Co. v. Commissioner of Int. Rev.,* 297 U.S. 129, 80 L.Ed. 528;

*Koshland v. Helvering,* 298 U.S. 441, 80 L.Ed. 1268;

*Electric Storage Battery Co. v. Shimadzu,* 307 U.S. 5, 83 L.Ed. 1071;

*Federal Communications Commission v. Pottsville Broadcasting Co.,* 309 U.S. 134, 84 L.Ed. 656;

*Halvering v. Credit Alliance Corp.,* 316 U.S. 107, 86 L.Ed. 307;

*Halvering v. Sabine Transportation Co.,* 318 U.S. 306, 87 L.Ed. 773;

*N.L.R.B. v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 81 L.Ed. 893;

*N.L.R.B. v. Atkinson & Co.* (C.A. 9) 195 F.(2d) 141.

We are impelled to petition for a Writ in the instant case because of the obvious sweeping, comprehensive and all-embracing reach of power here asserted by the Board. If national defense were to be the criterion for the interposition of the Board into the

operation of local businesses, then it goes without saying that it would have a weapon with which to step into practically any local community in every state in the Union. In these days and times (and who can say for how long a duration in the future?) national defense is all but universal throughout the land. No employment, no matter how minor or how far removed from the marts of trade, would be free from the Board's reach. If it involves a laundry today, why not barber shops, moving picture theatres, beauty salons and other purely household businesses tomorrow? Unless afforded judicial and constitutional protection, federal agency action, with ever increasing tempo, *could* (and why are we not justified in saying *would*?) wipe out in substantial measure the very fabric of the traditional distinction between state and federal jurisdictions.

This is nonetheless true if the ground of jurisdiction be shifted from national defense—as the Board sought to base it—to a minimal purchase of supplies, such as soap here, on the part of the local industry beyond state lines. Where is the butcher, the baker, the candlestick maker, the grocer or in fact any small local business man today, who does not buy equipment or supplies beyond state lines? Does that minimal and purely incidental circumstance mean that intrastate business thereby vanishes and evaporates and that the long reach of a federal agency steps in?[4]

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[4] We have here no concern over dealers furnishing goods to manufacturers of products designed for use in commerce. We recognize a long line of decisions bringing such products within the periphery of the commerce clause and notably so where the Fair Labor Standards Act is involved but even in such cases

Such is the problem which the decision poses to this Court. Petitioners therefore respectfully submit that a writ of *certiorari* should issue to the U. S. Court of Appeals for the Ninth Circuit in order to determine whether substantial rights granted by federal law for the protection of these petitioners and others similarly situated throughout the various states have not been infringed and denied.

The problem herein is not one limited to the peti-

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the courts have been alert to exempt establishments of a retail trade character where they are engaged in selling, not products, but goods and services. Cf. *Durkin v. Mercer Water Co.* (D.C. Pa.) 112 F.Supp. 656.

Nor need we notice cases such as that decided recently by this court, *Howell Chevrolet Co. v. N.L.R.B.*, December 14, 1953, ..... U.S. ..... (Adv. Sheet not yet printed), C.C.H. Par. 68,019, aff'g. C.A. 9, 204 F.(2d) 79. Entirely absent in that and related cases are the factors which go to make up the major problem in our case. In the *Howell* case there were obviously sufficient volume and substantiality of movement of automobile products as to constitute an integral link in the chain of a national distribution system. In our instant case we have nothing more than services, entirely local, which the Board seeks to bring within the ambit of the Commerce Clause by virtue of a *locale* within a defense project, but which the Circuit Court, deviating from the Board, treats within the coverage of the Commerce Clause by virtue of minimal purchases of soap outside the state. There is likewise comprehended within the issues of the instant case the question whether the Board, by its own fiat, may apply retroactive sanctions and whether it may do so in contravention of the mandates of the Administrative Procedure Act. Whether a failure to adhere to the Administrative Procedure Act is error, is a question affecting many parties and industries widespread throughout the country and by no means limited to the circumscription of these parties.

tioners who are parties hereto. It involves a pattern which the National Labor Relations Board, as a matter of first impression, seeks to lay down, which in principle affects an incalculable and innumerable class of small local businesses in every local community within the Union. It undertakes, as we earnestly urge, to extend to the National Labor Relations Board an unwarranted power of federal administrative action over local and community affairs. The impact of its decision is of such serious prejudice to petitioners and those similarly situated as to justify, we feel, this petition for review.[5] It would, if sanctioned, upset many years of settled recognition of a hitherto undoubted distinction between state and federal action under the Commerce Clause.

History of the federal system since 1879 is a history of expansion. It has been through the medium of implementing commerce and transportation within the reach of the Commerce Clause that the federal system has so largely expanded, and in expanding has done so at the expense of state and local jurisdiction. Judicial construction too has played an important role in the expansion movement. Federal courts, even in the absence of express legislation, have been, we may say, prodigious in amplifying federal power and thus diminishing or obscuring the exercise of such power at the state or local level. They have done so not only by liberally construing the enumerated powers defined in the Constitution but conspicuously also by invoking the doc-

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[5] Cf. *U. S. v. Ruzicka*, 329 U.S. 287; *Rathensies v. Electric Battery Co.*, 399 U.S. 296; *Patterson v. Lamb*, 329 U.S. 539.

trine of implied powers so as to include within the Commerce Clause many subjects of commerce theretofore reserved to the states; thus, little by little, federal power has superseded state jurisdiction to a very large extent, even at the expense of the constitutional concept that plenary power resides in the states and that the federal government is merely one of numerated or delegated power. Particularly since the 1930's has it been true that it is necessary only to evoke the image of commerce or transportation—great or small—in order to sustain practically any exercise of federal power.

Notwithstanding this trend toward expansion of federal control over commerce, we undertake to submit that there still exists a line of demarcation between state and federal power. Not everything that has to do with commerce or transportation falls within the federal domain. There is still a respect on the part of the federal government, and distinctly so upon the part of federal courts, for that which is peculiarly local and domestic. That which functions substantially and primarily within state boundaries lies, we submit, outside the reach of federal power. The contours which mark the boundary between state and federal authority have never been obliterated, nor do the courts ignore them. Were it otherwise, the very framework upon which our system of government rests would be undermined.

It is because petitioners feel that a business—call it commerce if you will—purely local and domestic in its essence remains under local or state control and outside the scope of federal authority that this petition is respectfully lodged with this Court. Petitioners are earnestly convinced that to sustain the position of the

Court of Appeals for the Ninth Circuit, affirming in turn the National Labor Relations Board, would go far indeed in the direction of blotting out all distinction between federal and state jurisdictional lines. It would sanction a new and heretofore never-exercised power. It would establish an authority on the part of the federal government to invade every local community and to regulate or control any and every local business. This Court has never authorized the federal government, under the guise of the Commerce Clause, to reach into the states and regulate or control business whose functions are substantially local. If there be a line of distinction between state and federal exercise of power over commerce, and if that line is still to be preserved, then we respectfully submit a review of this decision is vital and essential.

In urging our position upon this Court we do not for a moment lose sight of the fact that changing economic conditions and changing facts relevant to commerce and transportation have imposed upon the courts the task and obligation of adjusting judicial construction wherever necessary within the framework of the Constitution to meet such changes. We admit the force of this consideration, but in doing so we are, we believe, on firm ground in urging that judicial construction, justified though it may be within its proper limitations, cannot—should not—wipe out the essential fabric of our constitutional system. Conditions may change, and do change; both facts and conditions may from time to time shift, but such changing or shifting is, at most, contingent. Despite these contingent shiftings and changes, the framework of our con-

stitutional division between state and federal jurisdiction must remain permanent and unimpaired. That which is *contingent* may disappear; but the *substance* will still remain. The peculiar genius of our system has been its capacity to function through the medium of the exercise, side by side, of state and federal power without encroachment by one upon the domain of the other. It has succeeded in practice in carrying out the abstract Aristotelian concept of "The One" and "The Many" functioning together as a unit. That unity cannot be more explicitly defined than in the national motto which has so deeply woven itself into our economic life: "*e pluribus unum.*"

We undertake here to raise no question whatever with respect to the supremacy of the federal government in the field of interstate commerce. Where interstate commerce is in substance and reality actually involved, federal supremacy is conceded. Where the fact of interstate commerce exists, federal supremacy excludes all conflict therewith by any form of state action.

But we are here concerned with the exercise for the first time by federal authority of a regulatory power over a business traditionally, substantially and actually local in function. The business here involved is that of a local laundry. It serves a particular local community. It is true that the community itself is located within an area operating under the authority of the Atomic Energy Commission but it remains, nonetheless, a fact that the laundry in question falls outside the scope or definition of interstate commerce. It is no different in any respect whatsoever than the local restau-

rant, the local barber shop, the local beauty parlor, the local butcher, the local grocery store next door to or across the street from it.

It is the essence of our position that the National Labor Relations Board can exercise no power over the employees of this laundry shop unless the laundry is engaged in interstate commerce. The significant fact in this case is that the Board, in its decision, disavowed any claim that the operation of this local laundry involved interstate commerce. The Board reached its decision squarely and exclusively upon the ground that the laundry, though local and outside the realm of interstate commerce, nevertheless fell within its reach because it was located upon a governmental defense project or reservation. It was upon this holding that we assigned error in our petition for review by the Circuit Court. The Circuit Court hazarded no expression or opinion whatsoever upon this subject though it constituted the entire gravamen of the appeal but departed entirely from the Board's decision and by a strained inference undertook to adjudge the laundry to be engaged in interstate commerce.

If this holding should stand, every local business in every local community of every state in the Union would fall into the control of federal government and its various agencies. State jurisdiction and control would be, substantially speaking, a thing of the past. The 48 proud sovereign states of the Union would become in fact nothing more than mere provinces—mere administrative *"marches"*—under an all embracive federal imperium. Some, perhaps, would wish such a consum-

mation. It goes without saying that many, indeed most, would deplore it. This much is true: If we are to be transformed from a nation of 48 states, coordinate in dignity with the federal power, into one central federalized government in which the states are but a mere administrative agency or prefecture authorized only to carry out the federal command, then let such transformation and transmutation come, not by the alchemy of judicial construction but by frank open and avowed legislative processes, and may we venture to submit that there remain innumerable American citizens who confidently hope and believe that such a transformation may never occur.

## CONCLUSION

The questions and problem here involved transcend the mere correction of error below. Petitioners here seek to vindicate vital and important national rights which have and should have, as we feel, the same force and vigor in every community throughout the land as petitioners claim for themselves in the operation of their local laundry in Richland, Washington. Petitioners have, we submit, the right to operate their local laundry in conformity with the law which applies to their competitors and to others engaged in local operations, be they groceries, restaurants, theatres or other local business establishments. The power asserted by the Board in the instant case is not only novel but it is unprecedented. The problem inherent therein is of tremendous national and widespread importance. The decision below conflicts with fundamental principles and

with traditional decisions heretofore announced by this Court. The question is of substantial public interest and is particularly current today. It is one that has never heretofore been decided by this Court. It is respectfully submitted that this petition should be granted.

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## APPENDIX "A"

Statutes or excerpts therefrom, so far as material in discussion throughout the petition, are quoted as follows:

1. National Labor Relations Act:

(1) 29 U.S.C., 151:

"FINDINGS AND POLICIES— * * * It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

(2) 29 U.S.C., 152 (6):

"The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country."

(3) 29 U.S.C., 152 (7):

"The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or

the free flow of commerce, or having led or tending to lead to a labor dispute led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

2. Administrative Procedure Act:

(1) 5 U.S.C. 1001 (c):

"RULE AND RULE MAKING—'Rule' means the whole or any part of any agency statement of general or particular applicability and future effect, designed to implement, interpret, or prescribe law or policy or to describe the organization procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. 'Rule making' means agency process for the formulation, amendment, or repeal of a rule."

(2) 5 U.S.C. 1001 (f):

"SANCTION AND RELIEF—"Sanction' includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges or fees; (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. 'Relief' includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recognition of any

claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person."

(3) 5 U.S.C. 1002 (a):

"RULES—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization, including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published."

(4) 5 U.S.C. 1002 (b):

"OPINIONS AND ORDERS — Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules."

(5) 5 U.S.C. 1002 (c):

"PUBLIC RECORDS—Save as otherwise required by statute, matters of official record shall in ac-

cordance with published rule be made available to persons properly and directly concerned, except information held confidential for good cause found."

(6) 5 U.S.C. 1009 (e):

"Scope of Review—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 (Sections 1006, 1007 of this title) or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error."

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# In the Supreme Court of the United States

OCTOBER TERM, 1953

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Nos. 541, 542

HARVEY STOLLER D/B/A RICHLAND LAUNDRY AND DRY CLEANERS, AND LAUNDRY AND DRY CLEANERS UNION, LOCAL 197, AFFILIATED WITH LAUNDRY WORKERS INTERNATIONAL UNION, AFL, PETITIONERS

*v.*

NATIONAL LABOR RELATIONS BOARD

---

*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court below (R. 246–251) is reported at 207 F. 2d 305. The Board's decision and order (R. 74–86) is reported at 93 N. L. R. B. 680.

### JURISDICTION

The judgment of the court below (R. 252–258) was entered on November 9, 1953. The petitions for writs of certiorari were filed on January 18,

1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

## QUESTIONS PRESENTED

1. Whether the Board properly found that the unfair labor practices committed by petitioners affected commerce within the meaning of the National Labor Relations Act.

2. Whether the Board's assertion of jurisdiction in the instant case constitutes a valid exercise of its statutory authority.

## STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are set forth in Appendix D to petitioner Stoller's petition (No. 541) at pp. 41–43.

## STATEMENT

A. *The Board's findings and conclusions.*—The Board found (R. 75, 54–56) that petitioner Harvey Stoller, doing business as the Richland Laundry and Dry Cleaners (hereafter called Stoller), at the request of petitioner Laundry and Dry Cleaners Union, Local 197 (hereafter called the Union), discharged five employees in violation of Section 8 (a) (3) of the Act, contributed support and assistance to the Union in violation of Section 8 (a) (2), and by these and other acts interfered with and restrained his employees in the exercise of their rights under the Act, in viola-

tion of Section 8 (a) (1). The Board further found (R. 75, 60–61) that the Union violated Section 8 (b) (2) and 8 (b) (1) (A) of the Act by causing Stoller to discharge employees discriminatorily in violation of the Act. The Board accordingly entered its order remedying these unfair labor practices (R. 76–82).

Petitioners do not challenge the Board's unfair labor practice findings, but contend that the Board erred in asserting jurisdiction in this case. The facts relating to Stoller's operations may be summarized as follows:

Petitioner Stoller operates a laundry and dry-cleaning establishment employing 85 employees in Richland, Washington (R. 121). During the fiscal year ending in August 1950, he purchased supplies, including soap, cleaning solvents, and paper, amounting in value to approximately $24,000, of which about one-half was shipped to him from points outside the State of Washington. His gross income during this period amounted to approximately $241,000, of which approximately $200,000 represented service to residents of Richland and nearby areas; the remaining $41,000 represented services to the General Electric Company ($19,600 for cleaning garments worn by patrolmen and firemen), to the United States Army ($3,600), to a local hotel and restaurant operated under leases from General Electric ($14,000), and to a local competitor ($4,500). (R. 46–47; 107–110, 112–113, 115–116, 119–121.)

The town of Richland was an incorporated municipality before World War II. During the War the United States Government purchased all its buildings and land, together with adjacent land, and established the reservation upon which it built, adjacent to Richland, the Hanford Engineering Project, devoted to the development of atomic energy. Richland became the chief residential area for persons working in the project, and now has a population of approximately 23,000 people. (R. 46; 95–96, 140–141.)

Both the Project and the town of Richland are operated on behalf of the Government by General Electric Company under contract with the Atomic Energy Commission (R. 46; 98). The lease of the land and buildings in Richland is handled by General Electric as rental agent for the Commission (R. 46; 101–102). Petitioner Stoller leases the laundry and dry cleaning establishment, including all equipment and fixtures, from General Electric (R. 46; 104).

Upon the foregoing facts, the Board concluded that Stoller's operations affect commerce within the meaning of Section 2 (6) and (7) of the Act. The Board further concluded that Stoller's "relationship to the national defense effort, arising from his license to do business on a United States reservation devoted to atomic energy", "warrant[ed] the full exercise of the Board's power to assert the jurisdiction conferred on it by the Act." (R. 75.)

B. *The decision of the court below.*—The court below, enforcing the Board's order in full, concluded (R. 248–250) that Stoller's interstate purchases of materials and supplies sufficed to support the Board's assertion of jurisdiction over Stoller. The court rejected petitioners' argument that, even if the Act gave the Board jurisdiction in this case, such jurisdiction should have been declined by the Board as a matter of discretion.

## ARGUMENT

The petitions for certiorari, which rest in large part upon a failure to distinguish between the Board's jurisdiction conferred by the Act and the Board's discretionary power to decline to assert some of the jurisdiction Congress gave it, present no question warranting review by this Court.

1. The Board's statutory jurisdiction over petitioner Stoller, and consequently over the Union, cannot be seriously challenged. As already stated, Stoller in the conduct of his business purchases annually approximately $12,000 worth of supplies and materials directly from points outside the State of Washington. The volume of interstate commerce thus involved is clearly sufficient to sustain the Board's jurisdiction. Cf. *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U. S. 694, 699. A cessation of Stoller's operations as a result of industrial strife attributable to unfair labor practices, affecting as it would the inter-

state movement of these supplies and materials in their normal channels, would have, as the court below observed (R. 249), more than a *de minimis* effect on commerce. It follows, contrary to petitioners' contentions (S. Pet. 63–70; U. Pet. 9–19),[1] that the Board had power under the Act to remedy petitioners' unfair labor practices. *National Labor Relations Board* v. *Denver Bldg. Council*, 341 U. S. 675, 683–684; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 606–607; *Polish National Alliance* v. *National Labor Relations Board*, 322 U. S. 643, 647.

Petitioners' claim (S. Pet. 54–60; U. Pet. 11–12) that the Board, with the approval of the court below, predicated its statutory jurisdiction in the instant case solely upon what they characterize as "a ground foreign to the Act"—*i. e.*, the circumstance that Stoller's business operations were identified with the national defense program—misconceives the decisions of both the Board and the court below. As is evident from the text of the two decisions (R. 75, 248–249), the Board's holding that the Act gave it jurisdiction in the instant case was based upon the finding that "[Stoller's] operations affect commerce within the meaning of the Act." It was only in making its discretionary determination as to whether the instant case warranted the exercise

[1] The symbols "S. Pet." and "U. Pet." refer, respectively, to Stoller's petition (No. 541) and the Union's petition (No. 542).

of its undoubted statutory jurisdiction that the Board, applying the administrative standards it has evolved in this area,[4] gave decisive weight to the circumstance that Stoller's operations are identified with the Government's national defense effort.

But this does not mean, as petitioners assert, that the Board has undertaken to extend its statutory authority and to remedy unfair labor practices because they affect the national defense effort rather than, as the Act prescribes, because they affect commerce. The identification of the particular business enterprise with the national defense effort is merely a factor which the Board in the exercise of its administrative discretion takes into consideration in determining whether it would effectuate the policies of the Act to exercise its statutory jurisdiction over an enterprise whose operations otherwise bring it within the coverage of the Act. Given its clear statutory authority, the Board's discretionary determination to exert its power in cases of the type presented here supplies no basis for petitioners' attack. Cf. *National Labor Relations Board* v.

[4] These standards were explicated in a series of Board decisions which have since been published in the official reports of the Board's decisions and orders. The cases are cited and summarized in National Labor Relations Board, *Sixteenth Annual Report* (1951), pp. 15–16, 23–34. The Administrative Procedure Act, contrary to petitioners' assertion (S. Pet. 15; U. Pet. 5), does not require publication in the Federal Register of the Board's opinions or orders in the adjudication of cases. See Sec. 3 (b) of the Administrative Procedure Act, 5 U. S. C. 1002 (b).

*Denver Bldg. Council*, 341 U. S. 675, 684. As the court below has emphasized in prior cases, "providing the Board acts within its statutory and constitutional power it is not for the courts to say when that power should be exercised." *National Labor Relations Board* v. *Townsend*, 185 F. 2d 378, 383; *Galeston Drug Stores, Inc.* v. *National Labor Relations Board*, 187 F. 2d 418, 421, certiorari denied, 342 U. S. 815. *Accord: National Labor Relations Board* v. *Gulf Public Service Co.*, 116 F. 2d 852, 854–855 (C. A. 5); *National Labor Relations Board* v. *Mid-Co Gasoline Co.*, 183 F. 2d 451, 453 (C. A. 5); *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 181 F. 2d 34, 36 (C. A. 2), affirmed, 341 U. S. 694.[8]

[8] Related to their failure to distinguish between the Board's jurisdiction under the statute and the Board's discretionary power to withhold the exercise of that jurisdiction in appropriate cases is petitioners' mistaken contention that the Board changed the theory of its jurisdiction in the court below. The assertion is (S. Pet. 70–74; U. Pet. 12) that the Board relied upon Stoller's interstate purchases as the basis for its jurisdiction for the first time in the court below, but had grounded its decision solely upon Stoller's relationship to the national defense program. However, the complaint alleged that Stoller's operations affected commerce by reason of the fact that Stoller purchased substantial quantities of supplies in interstate commerce (R. 33). At the hearing a representative of the Board's General Counsel declared that the Board's jurisdiction was invoked, in part, on the basis of Stoller's substantial purchases of supplies from outside the State of Washington (R. 110–111). The trial examiner found that Stoller was engaged in commerce within the meaning of the Act (R. 48) and the Board expressly "agree[d] with the

It should be noted in this connection that the Board in its more recent decisions has indicated that it would not continue to exercise its statutory jurisdiction over enterprises similar to petitioner Stoller's. *Ideal Laundry & Dry Cleaners*, 107 N. L. R. B. No. 186, 33 L. R. R. M. 1271; *Taichert's, Inc.*, 107 N. L. R. B. No. 167, 33 L. R. R. M. 1240. These discretionary judgments carry no suggestion of doubt as to the Board's *statutory power* over such enterprises. They do, however, tend to minimize any importance that might otherwise inhere, for purposes of certiorari, in petitioners' attack upon the Board's prior judgment to exercise its statutory power over enterprises of this character.

2. Equally insubstantial as a basis for certiorari is petitioners' contention (S. Pet. 60–63; U. Pet. 5) that the Board in exercising its jurisdiction in this case has retroactively applied a jurisdictional standard adopted subsequent to the unfair labor practices in question. The vice in this contention is petitioners' assumption that the Board had, prior to the announcement of its

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Trial Examiner that [Stoller's] operations affect commerce within the meaning of the Act * * *" (R. 75). It was only following this finding that Stoller's interstate operations affected commerce within the meaning of the Act that the Board further concluded that Stoller's identification with the national defense program warranted "the full exercise of [the] power to assert the jurisdiction conferred on it by the Act." (R. 75.) Manifestly, there is no basis for petitioners' claim of a switch in jurisdictional theories.

administrative jurisdictional "yardsticks" (see note 2, p. 7, *supra*), declined to exercise its jurisdiction over enterprises like the one involved here. The Board has, however, exercised jurisdiction over laundry and dry cleaning enterprises like Stoller's since early in its history.[4] Accordingly, petitioners cannot complain that the unfair labor practices in this case were committed in reliance upon any policy of the Board to refrain from asserting the jurisdiction which it possessed. Cf. *National Labor Relations Board* v. *Kobritz*, 193 F. 2d 8, 13 (C. A. 1); *National Labor Relations Board* v. *Guy F. Atkinson Co.*, 195 F. 2d 141, 144–150 (C. A. 9). The jurisdictional standards the Board explained in October 1950 merely served to narrow the area over which the Board in its discretion would exercise its powers. The fact that the narrowing did not result in excluding petitioners from the jurisdiction the Board had always exercised affords no basis for their claim of retroactivity.

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[4] *Arcade-Sunshine Co.*, 12 N. L. R. B. 259, enforced, 118 F. 2d 49 (C. A. D. C.), certiorari denied, 313 U. S. 567 (1941); *Quality and Service Laundry, Inc.*, 39 N. L. R. B. 970, 972–973 (1942), enforced, 131 F. 2d 182 (C. A. 4), certiorari denied, 318 U. S. 775; *Star Dyers & Cleaners, Inc.*, 53 N. L. R. B. 514, 515 (1943); *H. B. Harwell*, 55 N. L. R. B. 845, 847–848 (1944); *Liberty Laundry Co.*, 62 N. L. R. B. 1235, 1236; *Sam Boorstein*, 64 N. L. R. B. 645, 646.

CONCLUSION

For the reasons stated it is respectfully submitted that the petitions for certiorari should be denied.

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FEBRUARY 1954.

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